

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 NATIONAL ASSOCIATION FOR THE
4 ADVANCEMENT OF COLORED PEOPLE,
5 SPRING VALLEY BRANCH, et al.,

6 Plaintiffs,

7 v.

17 Civ. 8943 (CS) (JCM)
Discovery Conference

8 EAST RAMAPO CENTRAL SCHOOL
9 DISTRICT and MARY ELLEN
10 ELIA, in her capacity as the
11 Commissioner of Education of
12 the State of New York,

13 Defendants.

14 White Plains, New York
15 September 20, 2018

16 Before:

17 THE HONORABLE JUDITH C. McCARTHY,

18 Magistrate Judge

19 APPEARANCES

20 LATHAM & WATKINS LLP (NY)
21 Attorneys for Plaintiffs
22 JENNIFER J. MATYSTIK
23 SERRIN A. TURNER
24 COREY ANNE CALABRESE
25 RAKIM E. JOHNSON

NEW YORK CITY CIVIL LIBERTIES UNION
Attorneys for Plaintiffs
PERRY GROSSMAN

Digital recording.

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1 APPEARANCES: (Continued)

2 MORGAN, LEWIS & BOCKIUS LLP
3 Attorneys for Defendant East Ramapo Central School
4 District
5 RANDALL M. LEVINE
6 DAVID J. BUTLER

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6 THE DEPUTY CLERK: In the matter of the NAACP versus
7 East Ramapo Central School District.

8 Counsel, please state your appearances for the record.

9 MS. MATYSTIK: Jennifer Matystik for the plaintiffs.

10 MR. TURNER: Serrin Turner for the plaintiffs, your
11 Honor.

12 MS. CALABRESE: Corey Calabrese for the plaintiffs,
13 your honor.

14 MR. JOHNSON: Rakim Johnson for the plaintiffs.

15 MR. GROSSMAN: Perry Grossman for the plaintiffs, your
16 Honor.

17 MR. BUTLER: David Butler for the defendant.

18 MR. LEVINE: Randall Levine for the defendant.

19 THE COURT: You're outnumbered today, gentlemen.

20 MR. LEVINE: As always.

21 THE COURT: Okay. Good afternoon, all.

22 So this was supposed to be just a status conference,
23 where I was going to hear how everything was going, and was
24 cautiously optimistic. It meant that I had not heard before
25 yesterday that everything was fine. And I will tell you I

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1 review for my cases well before the day before the case. So I
2 was under the impression this was going to be a status
3 conference in which I was going to hear how discovery was
4 going, not that I was going to hear there were problems.

5 Receiving a letter -- I don't even know what time we
6 got it -- late yesterday, and then getting a response in the
7 wee hours of the morning today is not how I like to see
8 business conducted ever. It's not good for the parties, it's
9 not good for the attorneys, it's not good for the Court. I
10 like to come out, have my conferences prepared, to have
11 meaningful conversations, to be able to give thoughtful
12 responses.

13 This isn't the first time you've appeared before me,
14 so you know that's how I like to conduct business. I'm limited
15 when I don't have the time. It's not like I have a free day
16 and I get to come in, in the morning and say, "Okay. What has
17 been sent, and what do I get to read to prepare for the
18 conferences?" I've been in conferences all morning, which
19 means my lunch was spent reading this correspondence. But
20 because I've read it, we're going to talk about some of the
21 things in here, and see if we can resolve some of the things
22 without motion practice, because I don't need to waste time on
23 motion practice, either.

24 But I do appreciate that there are some things that I
25 believe are not right, as the defendants have actually pointed

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1 out for my discussion.

2 But let's start with the deposition of the Board
3 members, which I think you have set before each other your
4 opinions. You've had a meet-and-confer. There was an intent,
5 I think, at least expressed, to file a protective order on this
6 issue.

7 So although I do share defendant's concern about how
8 this came about and the practice -- and we will address some of
9 it -- I will tell you I have seen defendants do some rough
10 things in past practices in cases before me, but I don't like
11 it. Didn't like it then, don't like it now.

12 But on the deposition of the Board members, is it the
13 defendant's position that you're not -- that you want to move
14 to quash that they have to be deposed at all? Or is it that
15 you're concerned that there are some things that they're going
16 to be asked that address legislative privilege and they can't
17 answer it? I was not a hundred percent sure.

18 MR. LEVINE: Thank you, your Honor.

19 So the position that we have laid out and what we
20 think the key to support is, is that there is a testimonial
21 privilege that is absolute for sitting legislators that is
22 different in scope and claim from the legislative privilege.
23 And so the immunity question is distinct. And what we didn't
24 see in the Court's prior order was something directing the
25 individual defendants to -- or rather, the individual

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1 subpoenaed parties to appear for deposition under the
2 subpoenas. And so we felt there was an ambiguity there. And
3 because the cases also draw a very clear distinction between
4 orders directing third-party government officials to produce
5 documents on the one hand and third-party government officials
6 to appear for deposition on the other, that issue wasn't
7 addressed in the Court's order, either.

8 So we wanted to find a way to present it to the Court
9 in an orderly way, present the issues and get it decided on an
10 expedited basis so that we could have a written order, one way
11 or the other, on the issue.

12 THE COURT: Who wants to be heard on this on the
13 plaintiffs' side?

14 MS. CALABRESE: Your Honor, we disagree with that
15 characterization of legislative immunity and legislative
16 privilege. This exact issue was discussed back in March. I
17 believe your Honor actually decided that legislative immunity
18 does not shield the Board members from any of plaintiffs'
19 requests, discovery requests, which would apply equally to our
20 document requests, as well as to our deposition notices.

21 And your Honor did distinguish between "immunity" and
22 "privilege" in your order from April 27, and did find that
23 immunity was not applicable here. So to the extent that
24 defendants are retreading old ground and once again saying that
25 the Board members are entitled to a blanket immunity from --

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1 back in March, it was from both document requests and
2 depositions, now it's once again depositions, is not correct
3 and is contrary to the law under Rodriguez, a case that your
4 Honor in part relied upon that was discussed during our hearing
5 back in March, and even said that at times, legislators may be
6 called upon not just to produce documents, but also for
7 testimony.

8 That's the plaintiffs' position.

9 THE COURT: Thank you.

10 MR. LEVINE: I'll respond to just two points on that,
11 one of which is substantive and has to do with the Rodriguez
12 case, which is, while the Rodriguez case says that in dicta,
13 the Rodriguez case does not involve a motion to compel a
14 sitting legislator to appear for testimony. And in fact, you
15 will search in vain for the entire body of case law, in this
16 circuit and in any circuit, to find a Court that has actually
17 ordered a sitting legislator to appear for testimony.

18 And the reason for that is because you can look at
19 Supreme Court cases and you can look at the text of the
20 speech-of-the-day clause. And the one thing that is quite
21 clear from the speech-of-the-day clause --

22 THE COURT: So why have legislators sat for
23 depositions? Because they have. And executives have sat for
24 depositions. Privilege is applied to them, too. So are you
25 telling me that they sat because they just were generous with

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1 their time, and gracious, and felt that they would just
2 volunteer to sit?

3 MR. LEVINE: The same reason that two sitting Board
4 members are going to testify in this case, and one former
5 legislator is going to --

6 THE COURT: Because you get to pick -- cherry-pick and
7 choose who you want to have testify?

8 MR. LEVINE: The legislators get to decide whether to
9 waive their immunity. And once they do, you know, that
10 actually is not co-extensive for the waiver of legislative
11 privilege, but they have that option to do so, and they have
12 that option to stand on the theory.

13 (Pause)

14 MR. LEVINE: The second point that I would have made
15 in response, also, is that, you know, the Court's order does
16 not explicitly say that the Board members have to appear for
17 deposition. The relevant sentence says, "As an initial matter,
18 legislative immunity" --

19 THE COURT: What page?

20 MR. LEVINE: At the bottom of Page 8 of the Court's
21 order.

22 "As an initial matter, legislative immunity does not
23 shield the Board members from responding to any of plaintiffs'
24 discovery requests."

25 And then the Court goes on to analyze whether certain

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1 discovery requests have to be responded to and documents
2 produced.

3 If the Court meant or implied by that that depositions
4 also would be required, well, then, you know, we'll expect the
5 Court to order that way and to direct the defendant -- the
6 individuals to appear for depositions. But we'll have a
7 written order, and then that can be reviewed further. We
8 simply don't have that right now, so we wanted to tee up the
9 issue.

10 THE COURT: Well, you had it. Why didn't you -- you
11 lived with this order. You didn't appeal this. So is this a
12 backdoor way of trying to get the Court to renew it so then
13 your time to appeal gets renewed? Is that what you're trying
14 to do here?

15 MR. LEVINE: Well, no, your Honor.

16 This order directs the subpoena recipients to produce
17 documents.

18 THE COURT: Yes, but, you know --

19 MR. LEVINE: And for what it's worth, we actually have
20 (unintelligible) experience dealing with a similar issue from
21 the very last case where the District was here before this
22 Court, where an issue of immunity arose and an order of this
23 Court was referred by Judge Seibel that implicitly required
24 sitting legislators to participate in discovery, but didn't
25 explicitly require it. And we appealed that ruling further to

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1 the Second Circuit, and they ruled that they lacked
2 jurisdiction to decide the question, because there was no
3 explicit order directing any recipient to the third-party
4 subpoena or discovery requests who has immunity to appear and
5 participate in discovery.

6 So to avoid that result this time, we wanted to
7 present the issues squarely, allow the Court to rule on it and
8 create a record. If we need to appeal, we will.

9 (Pause)

10 THE COURT: You can have a seat, Mr. Levine. It's
11 going to take me a second.

12 MR. LEVINE: Thank you, your Honor.

13 THE COURT: This is what happens when you don't give
14 me sufficient time.

15 (Pause)

16 THE COURT: Okay. This is what I'm going to do.

17 I am not setting forth any briefing schedule. I am
18 not ruling on this issue right now.

19 The issue that I had ruled on, on -- I believe my
20 decision is Docket 124, April 27th, 2018. The issue I had
21 ruled on was a motion made by the plaintiffs, and that was
22 Docket 86. It's a letter motion. In Docket 86, the plaintiffs
23 moved to compel the Board members to produce nonprivileged
24 documents and deposition testimony. That's what the motion
25 was.

The opposition to that motion specifically said, "We oppose the request for a motion to compel for nonprivileged documents and deposition testimony." I ruled your opposition was --

(Pause)

6 THE COURT: The opposition was Docket Number 91. And
7 in that, you were opposing the motion to compel compliance with
8 third-party subpoena seeking documents and deposition testimony
9 from each of the nonparty Board members. So clearly, what was
10 tee'd up to the Court was both.

11 The Court's order may be worded in such a way that it
12 seems limited to only the document request. I am going to
13 review the prior briefing, review the Court's order, and if I
14 believe that this order was not intended to be dealing with the
15 deposition testimony and believe that further briefing is
16 necessary for me to rule on that, I will let the parties know,
17 and I'll issue a briefing schedule which could be very tight.

18 If I believe, however, after review of the moving
19 papers and the decision, that it did also address the
20 deposition testimony, but was inartfully drafted, I will rule
21 on that, also.

22 I will tell you, I remember having this discussion at
23 oral argument. I remember specifically talking about
24 depositions. I remember specifically talking about the
25 documents, too. I also do say in here that this was addressing

1 both the subpoena duces tecum and ad testificandum. I do
2 address that.

3 But, Mr. Levine, you are right. It does not look like
4 there's anywhere in here, on a very fast review -- I may find,
5 when I look at it more closely, that I don't agree with what
6 I'm about to say, but it looks like I may have not specifically
7 said, although I may have meant, not to include depositions.
8 So I will evaluate it. I will determine whether I need any
9 more briefing or whether the briefing I had, which I believe
10 was on everything, and I believe my analysis covered
11 everything. I don't believe I was distinguishing documents
12 from testifying. But since I did address in each section the
13 actual documents that were being requested, and at the end, I
14 just said it was granted in part and denied in part. Now, if I
15 had granted it completely, I would say you're done, because the
16 request was for all of it.

17 So let me look at it. And I will notify the parties
18 and counsel -- I mean, I'll notify counsel how we're going to
19 proceed on that issue. Okay? But I don't want to
20 unnecessarily have to repeat arguments that I've already heard
21 extensively, because I know we had very long, extensive, oral
22 argument on this, where we had talked about depositions, and we
23 had talked about sitting legislators sitting actually for
24 testimony. So I don't want to repeat it. And if I can add to
25 my order without further briefing, I will do so.

1 So that's the first issue.

2 The second issue that's come in is the issue of the
3 2015 voter file. So I understand the arguments here. I just
4 don't fully understand -- I think I understand the arguments
5 here, although I will tell you, from plaintiffs' letter alone,
6 I had no idea what was going on. So if I understand this, on
7 the 2015 voter file, this docket that we're -- this Excel
8 document that we're dealing with is an active, nonhistorical
9 document. Right? It is an active document as to what's on the
10 computer at this time. And any updates that have been made
11 since that time would be reflective in the document now.

12 MR. LEVINE: Yes, straight from the District Clerk's
13 desktop.

14 THE COURT: Okay. So it's not like you can go back
15 and freeze this document in a certain time.

16 How did you produce -- do you -- how did you produce
17 the PDF? Like what was the PDF a PDF of?

18 MR. LEVINE: The PDF is a table of the -- just the --

19 THE COURT: If you could stand.

20 MR. LEVINE: Certainly. Sorry.

21 The PDFs that were produced were perhaps from a
22 database that has the historic (unintelligible), and so you can
23 produce these PDFs of tables that show who voted where in past
24 elections.

25 THE COURT: But what you're producing, is that

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1 database an Excel database?

2 MR. LEVINE: No.

3 THE COURT: So what happens? Tell me how it works.

4 At the end of an election, how is the document, the historical
5 document, preserved?

6 MR. LEVINE: This is the part that I was a bit worried
7 about when I was meeting and conferring with the plaintiffs,
8 which is, I'm not sure I know and understand and can make
9 accurate representations, because there's the District Clerk's
10 Office involved. There's a separate vendor involved. I
11 haven't talked to the separate vendor, I have talked to the
12 District clerk, both of whom are available for discovery if
13 they want to send them discovery requests. But I just don't
14 feel comfortable making representations about what this
15 proprietary software is that this vendor does, what it can spit
16 out and the format that it comes out, all of which can be
17 explored. But I'm not in a position to tell you about it right
18 now in a way that I feel comfortable won't be wrong.

19 THE COURT: So the Excel document you have no longer
20 looks like it did in 2015.

21 MR. LEVINE: That is true.

22 THE COURT: And there's really no way to make it look
23 like it did in 2015.

24 MR. LEVINE: So I'm not sure that that's -- there's no
25 way to make that Excel sheet look like it did in 2015. That is

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1 certainly true. What I don't know and what I'm not sure
2 whether the plaintiffs will even try is that the PDFs that they
3 have, those are -- it's searchable documents -- right? -- just
4 like an Acrobat on your own computer. And if you go to the
5 little file slot, it says, you know, "Turn to 'Export to
6 Excel'." And I don't know why that's not working for them.
7 But if it's not working, it shouldn't be too hard to QC it and
8 fix it. At least that's what the District Clerk told me. And
9 I asked her if she was required to figure out a way to
10 re-create somehow this old Excel sheet, that would at least be
11 where she would start.

12 THE COURT: Okay. So counsel.

13 MS. CALABRESE: Your Honor, I think the issue is just
14 that Mr. Levine represented that he would not even ask if this
15 2015 Excel sheet with the vendors could be produced with the
16 correct polling places. As you know, the results came in, in
17 2014. And that was our -- actually, I think if he goes back
18 and can say for certain that what we have is what we have, and
19 that the Excel document cannot be produced with the correct
20 polling basis, then we would be satisfied.

21 THE COURT: So what would the vendor have? I mean,
22 because it sounds like the Excel spreadsheet that you have is
23 the document that is currently -- and is in the form that is
24 currently in --

25 Who possesses this?

1 MR. LEVINE: The District Clerk.

2 THE COURT: -- the District Clerk's possession. The
3 question is whether the historical document that you had in PDF
4 format -- that's really the question, whether that historical
5 document that's in PDF format is somewhere in Excel.

6 MR. LEVINE: That question, I can answer. Right.

7 Those PDFs are not -- don't come from Excel. It's a
8 separate proprietary software. And if you look at the
9 documents, they don't look anything like Excel sheets. Right?
10 They're something this vendor generates when we need historical
11 data.

12 MS. CALABRESE: And, your Honor, I think what we
13 understood the Excel sheets to be was a spit-out from the
14 vendor, and the data that the vendor has in its possession. So
15 we thought when it spit it out, it spit it out the incorrect
16 polling places for the past elections, because we had asked --
17 we specifically asked for those past elections, but in Excel
18 format, and it came back with incorrect polling places. We
19 just want to know whether it can be produced with the correct
20 polling places as -- you know, as data spit out from the data
21 that the vendor possesses.

22 THE COURT: And do you know the answer to that,
23 Mr. Levine?

24 MR. LEVINE: I truly don't.

25 THE COURT: All right.

1 MR. LEVINE: And my recommendation would be, you know,
2 if we're going to have a 30(b) (6) deposition of the District's
3 third schedule, then they can answer that, or --

4 THE COURT: Yes, but they may not know this, either,
5 as to how the vendor may keep its documents.

6 MR. LEVINE: Yes. I mean, that all may be true. I
7 can try to find out.

8 But here's the thing. Even if I do run through with
9 this problem that we had discussed, which is, I'm also very
10 uncomfortable asking either the vendor or the District to
11 create this new document --

12 THE COURT: No, you're not asking them to create
13 anything.

14 MR. LEVINE: Okay.

15 THE COURT: What you're doing is -- because it sounds
16 like the District keeps a -- doesn't keep historical records.
17 It keeps an active list that is changed when polling places are
18 changed or people move, and it's an active list. So it doesn't
19 sound like the Clerk would have necessarily in the same Excel
20 world the historical stuff. If they do, you need to produce
21 it.

22 MR. LEVINE: Right.

23 THE COURT: You don't need to go back and undo things
24 in an active list. But if the -- now I'm forgetting the word.
25 Who's the -- the contractor, or the --

1 MS. CALABRESE: The vendor?

2 MR. LEVINE: The vendor. That's the word I'm asking
3 for.

4 If the vendor has the historical data in format of,
5 you know, Excel, or that is information -- in a format that
6 they can extract really easily from, then that is
7 information -- you're not asking them to create it. You're
8 saying, "Okay. Produce it." And then you give it to them.

9 MR. LEVINE: I agree with all of that.

10 My only hesitation is that, you know, we produced what
11 we have from the vendor when we asked them to generate the
12 information. Right? And then, they also generated it in the
13 ordinary course of business, so that the District Clerk keeps
14 these historical files on her computer. And that's what we
15 produced. So my only concern is that, you know, if the vendor
16 could be creating these things in Excel, we would have produced
17 it already. I can investigate further.

18 THE COURT: Unless it just didn't -- it said, "Okay.
19 We have these in PDF. This is how we provide them to the
20 Clerk. This is how we're going to provide them in response to
21 discovery." Which is all fine. But if they also have them in
22 another format which doesn't require them to create anything,
23 then -- and we know that the PDF is harder to manipulate,
24 because even if you can extract it, it sounds like it required
25 a lot of labor in order to correct and verify (unintelligible).

1 And that's my experience with working with PDF is that it
2 can -- when you try to start extracting things from them or
3 changing them or commenting on them, it can move things around.

4 So see if they have -- they may not. They may extract
5 it into PDF, and then that's it, and we know what we have to
6 work with. But just find out if they have the historical data
7 in an Excel format, not that they have to re-create it. Just
8 do they have it.

9 MR. LEVINE: Okay.

10 THE COURT: Okay? And provide it if they do.

11 MS. CALABRESE: Thank you, your Honor.

12 THE COURT: Okay. Now, it sounds like the documents
13 to be produced of Montesa and Schwartz is really not ripe for
14 me. Is that accurate?

15 MR. LEVINE: Well, that was my view. In the letter
16 response to their letter, we took the position that we don't
17 see any way that it could be relevant or proportional in this
18 case, and so weren't being produced. But we asked them to
19 explain why they think it should be produced, and they haven't
20 done that yet.

21 MS. CALABRESE: Your Honor, you know, we're happy to
22 go back and meet and confer on this. I think we have a
23 proposal that, you know, the District might agree to, and
24 that's if they would agree to produce the documents that really
25 (unintelligible) witnesses, then that's all we need to get.

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1 And those materials have been used to impeach our witnesses in
2 depositions without us having prior knowledge of them. It's
3 just that, you know, we brought it to the Court's attention
4 because they're coming to the conference, and didn't seem like
5 the District was going to negotiate it at all on the issues in
6 (unintelligible) they didn't file a response to our request for
7 production and --

8 THE COURT: When did you request production of that?

9 MS. CALABRESE: We made that back in March, your
10 Honor.

11 THE COURT: Okay. And did you respond to this saying
12 yes or no what you were going to do?

13 MR. LEVINE: In March?

14 THE COURT: No, any time from March till now.

15 MR. LEVINE: Yes -- no. In the course of this
16 meet-and-confer where they raised the issue of this discovery
17 request and we responded, and we provided the formal response,
18 but we also responded in a letter where we said, "We don't see
19 how this could possibly be relevant or proportional in this
20 case, but tell us why you think it is."

21 We also told them that the discovery record from
22 Montesa, the entire record per the (unintelligible), has been
23 sent to an outside vendor for cold storage.

24 THE COURT: Yes, but you're able to get the stuff on
25 the individuals that you want to ask questions on, so it's not

1 that difficult for you to get what you need.

2 MR. LEVINE: Well, I'm not sure that that's actually
3 true.

4 THE COURT: If you use the records in the deposition,
5 you have access to some of them.

6 MR. LEVINE: Well, so what they pointed to in their
7 letter was one document that had a Bates label from the prior
8 case. And it took me a while, actually, this morning to figure
9 out what had happened. But they had produced the same document
10 from, you know, their witness with their own Bates labels on
11 it. And I'm not entirely sure how the two got switched, but I
12 can say that this one particular document is kind of a crazy
13 document. And I do recall that I had actually kept a copy of
14 it, and it was not sent off site. It was not part of that
15 total, you know, dump of the entire discovery record that's in
16 outside storage. So maybe there's a smattering of documents
17 that were marked confidential and that are available because
18 they happen to still be on my computer. But you know, that's
19 not the same thing as a request for, well, 450-something
20 thousand documents that we have in cold storage.

21 MS. CALABRESE: Your Honor, just -- I can't verify
22 that we did not produce this document. But I know that the
23 witness it pertained to, we didn't produce those documents for
24 that witness until August. So we did not have access to it
25 back in March, you know, to use for deposition.

1 THE COURT: When did you get it, and how did you get
2 it?

3 MS. CALABRESE: The document?

4 THE COURT: Yes.

5 MS. CALABRESE: I mean, we just found out about it in
6 Mr. Trottman's deposition, and we produced Mr. Trottman's
7 documents in August. And I haven't -- I didn't -- I don't know
8 if we have it in our collection and if we produced it this past
9 August when we made our production for Mr. Trottman. I'll have
10 to confirm that (unintelligible).

11 THE COURT: Here's my thought on this. It's not
12 really ripe for me, but I'm going to give you some guidance to
13 help me. You have a more productive and fruitful
14 meet-and-confer. I will not take the position, as Judge Seibel
15 did not take the position, that none of these documents are
16 relevant.

17 So a blanket "Montesa is not relevant" isn't going to
18 work. You really -- but I also will tell you that to request a
19 document dump essentially of all the document discovery
20 produced in Montesa is overburdensome. As having seen that
21 case and overseen that case and the amount of documents that
22 were produced in that case, that would not be something that --
23 and I'm sure some of them are confidential and have been marked
24 under a protective order. So they just couldn't be
25 automatically produced. Also, it would be quite burdensome, I

1 believe, to require counsel to go through everything and then
2 pull out what is protected by confidential order or not, and
3 then produce it.

4 However, if there are certain documents and certain
5 things that you can glean from the facts of that case and from
6 the docket sheet of that case that you believe are relevant --
7 for instance, what you just talked about, which are the
8 documents relating to the plaintiffs in your case and the
9 parties that you mentioned in your case -- I don't see why
10 those would not be relevant, even though they may be
11 burdensome.

12 But neither party has really had a chance to delve
13 into that and work with it and to be able to tell me with
14 specificity why either you need it or why it can't be produced
15 because it's too burdensome or et cetera. I'm not going to
16 rule on it. My guidance, I'm consistent with Judge Seibel
17 here. I think Judge Seibel said they may be relevant. They
18 may be relevant. So blanket "they're not" is not going to
19 work. However, I just don't know what it's going to be. And
20 there may be an off-side charge. You may have to take them,
21 and there's also that burden that comes in document production,
22 whether with the client or the attorneys having it.

23 So hopefully, the request can be narrowed in such a
24 way, Mr. Levine, that you can analyze it and determine
25 whether -- and so you can produce it, and, if not, why not.

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1 MR. LEVINE: Thank you, your Honor, because, I mean,
2 just to drill down a little bit further on that, in any set of
3 450,000 documents, you may find that there are documents that
4 are relevant and proportional and worth producing in this case,
5 and some that aren't. Nothing about the fact that they are the
6 Montesa discovery record makes them relevant to this case. It
7 would be whatever is in the document. If what the plaintiffs
8 want are documents within the District's possession, custody or
9 control that relate or refer to their clients, that's a very
10 different discovery request.

11 THE COURT: No, I think that there's a -- I think that
12 is a different discovery request, and that's not what the
13 plaintiffs are asking for. Plaintiffs may ask for that, but
14 right now, it sounds like they're asking for what Montesa
15 documents were produced related to particular clients.

16 Is that correct, counsel?

17 MS. CALABRESE: Yes, your Honor.

18 THE COURT: So I'm not going to say it's not relevant.
19 Judge Seibel did not say it wasn't relevant. She didn't narrow
20 it to just what was in the District's possession. Of course,
21 there's no question about that. If there's documents that are
22 relevant in the District's possession, they're to produce it.
23 So the real question is if there are documents in the Montesa
24 case that are relevant here. It's not a blanket "you don't
25 have to produce it." You have to look and evaluate and

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1 determine -- you know, an overbroad request is going to get an
2 overbroad response. You've narrowed the request. You're going
3 to have to have a meet-and-confer and discuss this.

4 MR. LEVINE: Sure.

5 THE COURT: But don't just say because it's in Montesa
6 or rephrase the question and say, "I'll just look and see
7 what's in the District documents."

8 It's different, and it's slightly different enough
9 that I don't think it is -- I don't think it's blanketly
10 irrelevant.

11 MR. LEVINE: Well, what I mean is that the Montesa
12 documents are just a subset of the District's documents that
13 happen to have Bates labels on the bottom. So that portion of
14 the Montesa discovery record that is student records, the
15 District has those student records.

16 THE COURT: But the Montesa discovery -- Mr. Levine,
17 the Montesa discovery documents that you have are not just what
18 you produced. It's also what you received.

19 MR. LEVINE: Right.

20 THE COURT: So there may be things that are in your
21 possession that are not in the District's possession. They're
22 in the possession of a different class of plaintiffs and a
23 different group of people. So no, you cannot just narrow it to
24 the District. It's part of it.

25 MR. LEVINE: Okay.

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1 THE COURT: So you know, meet and confer on this
2 issue. Have a conversation. See what you can produce. And if
3 you have to send something up to me, you know how to do it.
4 Just don't do it on the eve of a conference.

5 MS. CALABRESE: Yes, your Honor.

6 THE COURT: Okay. Is that everything that came up in
7 the letter? Otherwise --

8 MS. CALABRESE: Yes, your Honor.

9 THE COURT: -- I want to hear how discovery is going
10 separate from this, because I'm hoping it's going better than
11 the implication I had and the letter would seem.

12 I assume the initial disclosures were served on
13 August 10. I think that's this last civil case discovery is
14 the one we're working off. This is the one that's July 12th,
15 2018.

16 MS. CALABRESE: Yes, your Honor.

17 THE COURT: Okay.

18 MS. CALABRESE: And yes, we served -- we exchanged
19 initial disclosures on that date.

20 THE COURT: And the document production for all
21 outstanding requests for production of third-party subpoenas,
22 was that completed by August 10th?

23 MS. CALABRESE: Yes, your Honor.

24 We might have some follow-up. We received the
25 District's privilege logs, and might have follow-up from that.

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1 THE COURT: Yes. No, I understand you'll talk about
2 that, see if it needs to come --

3 MR. LEVINE: And same on our end, as well. They made
4 their production. They haven't produced a privilege log yet.
5 We've been exchanging letters about cleaning up different areas
6 of the production, but it's ongoing.

7 THE COURT: Is there a privilege log that you're
8 intending to produce, counsel?

9 MS. CALABRESE: Yes, your Honor. There was, your
10 Honor.

11 THE COURT: Okay.

12 MS. CALABRESE: If they wish -- they're aiming for the
13 end of next week.

14 THE COURT: Okay. We have depositions to proceed, to
15 occur and complete by October 19th.

16 Have we started discussing that and scheduling for
17 that?

18 MS. CALABRESE: Yes, your Honor. Both parties have
19 noticed depositions, and we're in conversations about
20 scheduling.

21 THE COURT: How many depositions have been noticed?

22 MS. CALABRESE: Your Honor, plaintiffs have noticed
23 eight. The District has currently noticed fifteen.

24 THE COURT: How many?

25 MS. CALABRESE: Fifteen.

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1 THE COURT: Okay.

2 MS. CALABRESE: And plaintiffs have objected to more
3 than ten, which is what's permitted under the rule.

4 MR. LEVINE: That's interesting. That's actually
5 different from the conversation I had with Ms. Matystik
6 yesterday, where I asked whether they were going to stand on
7 that objection or whether there was something else going on,
8 because depositions that we noticed are those of the plaintiffs
9 themselves, their experts and the declarants who submitted
10 affidavits in support of their motion for preliminary
11 injunction, so the witnesses they intend to call. And I asked
12 whether they were going to make me go to court to get leave to
13 take those depositions, and Ms. Matystik said no.

14 MS. MATYSTIK: May I, your Honor.

15 THE COURT: Sure.

16 MS. MATYSTIK: Last year, the maximum number of
17 depositions was brought up with Mr. Levine. He asked us if it
18 was plaintiffs' position that absolutely no more than ten
19 depositions would be permitted. I said that if they wanted to
20 schedule ten depositions, and then discuss anything beyond
21 that, we would be open to it, or if they wanted to let us know
22 who they -- who ten deponents would be, we could discuss any
23 possible deponents beyond that number, but that we weren't
24 going to at the outset just agree to 14 now, 15 as of this
25 morning, depositions. That's not what we're willing to do on

1 the phone with Mr. Levine.

2 MR. LEVINE: If that's the case, your Honor, I would
3 like to ask for leave to take the depositions of the named
4 plaintiffs.

5 THE COURT: How many named plaintiffs are there?

6 MR. LEVINE: There are perhaps -- and correct me if
7 I'm wrong -- seven or nine.

8 MS. CALABRESE: Nine.

9 MR. LEVINE: I have it here. Well, let's see here.
10 There is one, two, three, four, five, six, seven, eight, nine
11 named plaintiffs. They have --

12 MS. CALABRESE: Your Honor, I apologize for
13 interrupting.

14 So not all of our named plaintiffs are on our initial
15 disclosures. Sorry. Other witnesses that have been noticed.
16 We've noticed three additional witnesses are not on our initial
17 disclosures, your Honor.

18 THE COURT: And who are those additional three
19 witnesses?

20 MS. CALABRESE: Amelia White, Steve White, and Peggy
21 Hatten.

22 THE COURT: Are they named plaintiffs, Amelia White,
23 Steve White and who?

24 MS. CALABRESE: Peggy Hatten.

25 They're not named plaintiffs. Ms. Hatten had

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1 submitted a declaration on behalf of the preliminary
2 injunction, but we did not include her in our initial
3 disclosures, because we don't intend to call her as a witness.

4 THE COURT: Mr. Levine?

5 MR. LEVINE: Why did you notice those depositions?

6 THE COURT: Peggy Hatten, because they don't intend to
7 call her, you still want to take her deposition?

8 MR. LEVINE: Well, I'm not sure. I mean, we've
9 actually had (unintelligible) to meet and confer.

10 THE COURT: Yes.

11 MR. LEVINE: I don't know what the status is of the
12 declaration.

13 THE COURT: Here's what's going to happen.

14 MR. LEVINE: I will say they have produced many
15 thousands of Ms. Hatten's documents already.

16 THE COURT: Yes. I now remember her name.

17 Amelia White, Steve White, Peggy Hatten. They're
18 going to be allowed to be deposed if they're over the ten.

19 My familiarity with this case, my familiarity with
20 those names, my familiarity with their documents, because I
21 believe I had to review them in the Montesa case, makes me
22 realize they may have relevant information that would help the
23 defendants, whether you're going to call them as a witness or
24 not. When you have a case that has this many plaintiffs, then
25 you cannot ask the defendants -- to basically say, "Okay. You

1 can only take the plaintiffs' deposition." I am, though, going
2 to say --

3 How many have you noticed right now?

4 MR. LEVINE: Fifteen notices.

5 THE COURT: Okay.

6 MR. LEVINE: For what it's worth, several of those --
7 I don't have the numbers in front of me, but several of those
8 are depositions that are not to exceed four hours.

9 THE COURT: Yes, because they've been deposed
10 previously.

11 MR. LEVINE: Right.

12 THE COURT: And I limited the deposition or you guys
13 agreed to it. I think we had a discussion, and it's been
14 limited to four hours.

15 MR. LEVINE: Right. So we're finishing those
16 depositions. I think that's five or six of them off the top of
17 my head.

18 THE COURT: Okay. Unless good cause is shown, your
19 number is limited to 15. So if you need to go over 15 -- and
20 they're not calling Peggy Hatten. You know, you may not want
21 to waste your time on that. You guys can meet and confer about
22 it. But I don't want to see motion practice on this.

23 MR. LEVINE: Does that include the depositions that
24 we're just finishing the depositions?

25 THE COURT: Yes.

1 MR. LEVINE: So 15 starting now.

2 THE COURT: Yes. So anybody you're finishing comes
3 into those 15.

4 MR. LEVINE: Okay.

5 THE COURT: I'm not going to take them out of that and
6 say you have 15 or top of those.

7 MR. LEVINE: Okay. And we can talk with them later --

8 THE COURT: Yes.

9 MR. LEVINE: -- about whether they're going to
10 withdraw Ms. Hatten's declaration and what they're intending to
11 do with the documents that are (unintelligible).

12 THE COURT: Yes.

13 MR. LEVINE: Okay.

14 THE COURT: You don't have to take any of these
15 depositions. You don't have to take up to 15. I just don't
16 want to see any motion practice before me on this issue. You
17 know, you guys can meet and confer who you think the best to
18 be. And if you only do ten, you only do ten. If you are able
19 to talk about and agree that certain people, although they may
20 produce, you know, a thousand documents on them, are not going
21 to be people that are called and rely on and they're not
22 relying on the documents or anything like that, you may not
23 take the deposition, and don't waste everybody's time and money
24 on it.

25 MR. LEVINE: Agreed.

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1 MS. CALABRESE: Your Honor, just to be clear, the 15
2 for both sides, or just the District?

3 THE COURT: Just the District, because I haven't heard
4 why you need more.

5 MS. CALABRESE: We've only noticed some of the Board
6 members, your Honor. And we took the ones we thought would be
7 most important when we were thinking that we were limited to
8 ten depositions. So I think we would also seek to expand the
9 number of depositions we could take to make sure we are able to
10 depose all of the current and some of the former Board members.

11 THE COURT: Counsel?

12 MR. LEVINE: Well, they also have several more
13 third-party subpoenas outside of the Board.

14 MS. CALABRESE: And those were only for -- one for a
15 deposition, but two are for documents, because we believed we
16 were limited to ten depositions.

17 MR. LEVINE: So I wasn't sure what the status of that
18 is. You have our objection on compelling sitting members of
19 the Board to appear for deposition. If they want 15, I'm not
20 going to stand on --

21 THE COURT: I'm going to give both sides 15, and then
22 we'll figure out what's happening on my ruling on the sitting
23 Board members.

24 MS. CALABRESE: Thank you, your Honor.

25 THE COURT: Okay? Anything else that -- I really do

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1 want those depositions to be done by the 19th of October. So
2 with this many, you'd better continue to talk about scheduling.

3 Was plaintiffs' expert report served?

4 MS. CALABRESE: Yes, your Honor.

5 THE COURT: Okay.

6 (Pause)

7 THE COURT: Okay. Anything else we need to deal with
8 today? Otherwise, I'm going to look for a date for another
9 conference.

10 MR. LEVINE: One last piece, which we did raise in our
11 letter, which is that the Court's rules are pretty clear about
12 what's allowed to be included in letters to the Court, and they
13 don't include correspondence. And only one side has been
14 adhering to that, and I feel like I'm fighting with one hand
15 tied behind my back.

16 MS. CALABRESE: Your Honor, we obviously defer to you.
17 We understood that rule to mean not to file letters, discovery
18 letters, that we send to each other on the docket as their own
19 individual filing, but that in the course of discovery
20 disputes, you would permit parties to submit correspondence.

21 THE COURT: Give me one second.

22 MS. CALABRESE: I think that that's as to discovery
23 motions.

24 (Pause)

25 THE COURT: Okay. So I'm looking at my individual

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1 rules, because I have my understanding of my individual rules,
2 but unfortunately, change them enough that I want to make sure
3 I looked at the most up-to-date one.

4 Under my individual rules:

5 Paragraph 1: "Communication with chambers.

6 "A. Letters. Except as otherwise provided below,
7 communications with chambers shall be by letter with copies
8 simultaneously delivered. Copies of correspondence between
9 counsel shall not be sent to the Court unless there's a request
10 to file a letter under seal or a letter contains confidential
11 information. Letters should be filed on ECF."

12 This rule applies to communications between the
13 parties. It should not be filed on the Court as they're being
14 communicated, because, unfortunately, I'm sometimes bombarded
15 with people's own bickering where there's nothing I need to do
16 about it. They're just kind of copying the Court on it.

17 When you're making a motion -- sometimes there's
18 motions for sanctions, sometimes there's motions for contempt,
19 sometimes there's motions for discovery failings -- often the
20 evidence that is in support of those motions are communications
21 between counsel, and they're attached as exhibits. That's what
22 I mean. That rule does not say do not attach correspondence
23 that is going to support the arguments being made by the
24 parties. It's really "Don't bring me into something and
25 communicate with each other on something that I don't need to

1 act on," because, one, it clutters my mailbox, so to speak, and
2 two, I will be reading every single letter that comes in on ECF
3 on any case that I am dealing with. And if I don't have to
4 take any action, it's not a good use of my time.

5 So I have no objections to counsel who need to attach
6 communications with each other in order to show and support the
7 point they're trying to make to the Court. It's attached as an
8 exhibit. It's not being filed for me as a stand-alone letter.
9 Don't CC me on correspondence between the parties.

10 So, Mr. Levine, if you misunderstood that, and you
11 have not done that in the past, you're welcome to do it now.
12 But I do not want to see myself become a third party to all of
13 the communications between each other. I hope that makes --
14 clarifies that rule.

15 MR. LEVINE: Very useful guidance.

16 Thank you, your Honor.

17 THE COURT: Anything else?

18 MS. CALABRESE: Not from the plaintiffs, your Honor.

19 MR. LEVINE: Not from us.

20 THE COURT: When should we talk next? I would say
21 after October 19th.

22 MR. LEVINE: That sounds right to us.

23 THE COURT: Beginning of November?

24 MR. LEVINE: Couple of weeks of October are going to
25 be pretty busy.

1 THE COURT: First week in November?

2 MS. CALABRESE: That works for us, your Honor.

3 MR. LEVINE: How about the 8th?

4 THE COURT: Is the 8th a Sunday? November 8, yes.

5 (Pause)

6 THE COURT: Does the 5th of November work for
7 everyone?

8 MR. LEVINE: Yes, works for us.

9 MS. CALABRESE: That's fine, your Honor.

10 THE COURT: You prefer to come in the afternoon,
11 counsel?

12 MR. LEVINE: Yes.

13 THE COURT: Ms. Hummel, what do I have available on
14 the 5th in the afternoon?

15 THE DEPUTY CLERK: You can do 2:00 p.m.

16 THE COURT: Does 2:00 p.m. work for plaintiffs and
17 defendants?

18 MS. CALABRESE: Yes, your Honor.

19 THE COURT: Mr. Levine, is that fine?

20 MR. LEVINE: Yes, your Honor.

21 THE COURT: Okay. So November 5th, 2:00 p.m.,
22 in-person conference.

23 I will let you know if I need to speak to you or any
24 briefing on the issue you've raised regarding the subpoenas.
25 I'll try to do that promptly so that you don't lose any time on

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1 that issue, especially if I'm going to need any briefing -- any
2 further briefing on that issue.

3 MS. CALABRESE: Thank you, your Honor.

4 THE COURT: Okay? Thank you very much, counsel.

5 Have a good day.

6 And happy holiday to all of you who celebrate it.

7 MR. LEVINE: Thank you, your Honor.

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